THE PROSECUTORS' MANUAL

CHAPTER 17 – RULE 11 – INCOMPETENCE OF DEFENDANT

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**The Prosecutor's Manual Volume III**
**Chapter 2**
**Rule 11 Competency Proceedings**

INTRODUCTION

> A person shall not be tried, convicted, sentenced or punished for a public offense, except for proceedings pursuant to A.R.S. § 36-3707(D), while, as a result of a mental illness, defect, or disability, the person is unable to understand the proceedings against him or her or to assist in his or her own defense.

Rule 11.1, Arizona Rules of Criminal Procedure.

The right not to be tried, convicted, sentenced or punished while insane arises from common law. *State v. Thomas,* 78 Ariz. 52, 275 P.2d 408 (1955), overruled in part on other grounds by *State v. Pina*, 94 Ariz. 243, 383 P.2d 167 (1963). In Arizona, insanity as a defense and incompetence to stand trial are distinguished and take effect under different circumstances. *State v. Fayle,* 134 Ariz. 565, 658 P.2d 218 (App. Div. 1 1982); *State v. Steelman*, 120 Ariz. 301, 585 P.2d 1213 (1978), appeal after remand 612 P.2d 475. A defendant's insanity does not automatically preclude his competence to stand trial and vice versa. *Steelman*, *supra*. Ironically, the prosecutor faced with establishing competence to stand trial may find himself proving the sanity of the defendant to avoid defense attempts to negate the element of intent, even if insanity is not raised as a defense. Rule 11 is the procedural mechanism used to determine the defendant's competence at any stage of the proceedings.

> The procedures and processes to determine competency of a criminal defendant are found in rules implemented by our supreme court. *See* Ariz. R.Crim. P. 11.1 to 11.6. The procedures delineated in the Rules of Criminal Procedure have been further codified in A.R.S. §§ 13-4501 to -4517 (2001 and Supp. 2008). Together, these rules and statutes govern proceedings for the determination of competency and court-ordered restoration treatment in criminal prosecutions.

*State v. Silva*, 222 Ariz. 457, 460, 216 P.3d 1203, 1206 (App. Div. 1 2009).

Rule 11 may be invoked at any stage of the proceeding and may effectively delay your trial. An understanding of Rule 11 and its operation is necessary to prevent unnecessary delay or a later reversal based on defendant's incompetence. Because of the complex interplay of criminal and civil law in this area, A.P.A.A.C. has generated a flow chart that illustrates the process. Where possible, the chart includes specific statutory references. This chart is not intended as an exhaustive authority, but rather should be used for quick reference. This particular area of law requires a working knowledge of both the criminal and civil law because civil commitment may be the only process available to ensure the defendant is taken off the streets.

This chapter is divided into two major sections. The first section discusses the law surrounding Rule 11. The second section discusses the actual procedure of Rule 11. The second section is purposely brief to allow for speed in assimilating the information. It is recommended that those unfamiliar with Rule 11 read through Section I before looking to the procedural aspects of the Rule in Section II.

## I. RULE 11 – THE LAW

### A. Constitutional Basis

"The question of whether a defendant is competent to stand trial is a federal one requiring an interpretation of the federal Due Process Clause." *State v. Ferguson*, 26 Ariz.App. 285, 287 n.2, 547 P.2d 1085, 1087 (App. Div. 2 1976), citing *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836 (1966). A defendant has a right not to be tried if "he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." *Drope v. Missouri*, 420 U.S. 162, 171, 95 S.Ct. 896, 903 (1975); *Dusky v. United States*, 362 U.S., 402, 80 S.Ct. 788 (1960).

The Constitution permits a State "to limit [a] defendant's self-representation right by insisting upon representation by counsel at trial-on the ground that the defendant lacks the mental capacity to conduct his trial defense unless represented." *Indiana v. Edwards*, 554 U.S. 164, 128 S.Ct. 2379, 2385-86 (2008).

### B. The Rule 11 Motion

#### 1. Who May Move?

Any party may move for a competency hearing to determine whether the defendant is mentally able to stand trial or to determine whether the defendant is able to conduct his own defense. Rule 11.2; A.R.S. § 13-4502. *See State v. Djerf*, 191 Ariz. 583, 591, 959 P.2d 1274, 1282 (1998).

#### 2. Timing

##### a. Timeliness of Motion

Rule 11.2(a) permits any party to file a motion for Rule 11 examination at any time after an information or complaint is filed or an indictment returned.

Because the court has an obligation to wait until reasonable grounds exist to order a competency hearing, the judge may wait until eve of trial before holding a hearing to determine whether reasonable grounds exist for competency hearing, even after repeatedly rejecting defense counsel's request for a Rule 11 hearing. *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119 (2004).

Don't confuse the limit of time to restore a defendant to competency with the authority to determine whether a defendant is competent to stand trial. The 21 month limit in A.R.S. § 13-4512(I)(1) and Rule 11.5(b) governing competency proceedings applies only to restoration treatment orders during a defendant's incompetency, not the court's authority to determine competency. *State v. Silva*, 222 Ariz. 457, 460, 216 P.3d 1203, 1206 (App. Div. 1 2009).

##### b. Time for Rule 11 Determinations Excluded From Speedy Trial Guidelines

Rule 8.4(a) specifically excludes delays resulting from Rule 11 actions from the speedy trial requirements

of Rule 8.2 and 8.3. The time is excluded regardless of who brings the petition because the action is on behalf of the defendant and to ensure his competence. *See State v. Starcevich*, 139 Ariz. 378, 678 P.2d 959 (App. Div. 2 1983). The time excluded begins with the petition for examination and runs until the court has made a determination. *State v. Landrum,* 112 Ariz. 555, 544 P.2d 664 (1976) (Rule 11 requires both hearing and determination). The court should act expeditiously in making its determinations, but reasonable delays are acceptable. *Starcevich, supra* (two court days (four actual days) was reasonable). *See also State v. Kelly,* 123 Ariz. 24, 597 P.2d 177 (1979) (delay occasioned by Rule 11 motion filed on last day of trial, which may have resulted in lost witness, was result of properly granted motion and defendant failed to show prejudice).

c. Co-defendant's Rule 11 Waives Time for All

Delay caused by one defendant's Rule 11 motion is excluded time for all the other co-defendants. *State ex rel Burger v. Maricopa County Superior Court,* 111 Ariz. 335, 529 P.2d 868 (1974).

3. Contents of Motion

Rule 11.2 requires that the motion for examination under Rule 11 "shall state the facts upon which the mental examination is sought." Presumably, the motion will set forth whatever "reasonable grounds" the movant believes require a mental examination. No other content requirements are set out by the Rule. *But see State v. Messier,* 114 Ariz. 522, 562 P.2d 402 (App. Div. 1 1977) (initial motion dismissed for lack of specificity, defendant redrafted and tried again). The assertions of counsel, without additional evidence, are insufficient to support a motion under Rule 11.2. *State v. Bishop,* 137 Ariz. 5, 667 P.2d 1331 (App. Div. 2 1983); *State v. Verdugo,* 112 Ariz. 288, 541 P.2d 388 (1975).

Keep in mind that because of the burden on all parties to ensure the competence of the defendant, it may not be the best strategy to challenge the motion on sufficiency of content, but seek a ruling dismissing the motion for lack of "reasonable grounds." See Rule 11.3(a).

It has also become customary to seek a "pre-Rule 11" screening to assist in the determination of "reasonable grounds." See Section II, "Procedure," *infra*; *State v. Borbon,* 146 Ariz. 392, 706 P.2d 718 (1985). This "pre-Rule 11" screening may be authorized by the judge in connection with a preliminary hearing to determine whether reasonable grounds exist for a competency examination. *State v. Messier,* 114 Ariz. 522, 562 P.2d 402 (App. Div. 1 1977).

The court should not substitute this preliminary hearing for a competency determination, but the court has broad discretion on the question of reasonable grounds and the decision will not be overturned absent manifest abuse of discretion. *State v. Williams*, 166 Ariz. 132, 800 P.2d 1240 (1987). *State v. Roper,* 140 Ariz. 459, 682 P.2d 464 (App. Div. 1 1984); *State v. Salazar,* 128 Ariz. 461, 462, 626 P.2d 1093, 1094 (1981).

4. When Hearings Are Required

Whenever the court determines reasonable grounds exist, a competency examination and hearing must be ordered. *State v. Messier,* 114 Ariz. 522, 562 P.2d 402 (App. Div. 1 1977).

Rule 11.1 sets out the four "stages" of a trial where competency is most likely to be an issue: a) pretrial, b) at trial, c) at sentencing, and d) execution of sentence.

a. Pre-trial

Motions under Rule 11 may arise at the pre-trial stage in two situations: 1) when defendant's ability to understand the proceedings against him or assist in his own defense is questionable (Rule 11.1), or 2) when defendant plans to raise the insanity defense (Rule 11.3(f)). These two situations are neither mutually inclusive nor mutually exclusive.

If a defendant is found incompetent to stand trial, he is not presumed to have been insane at the time of the offense. Likewise, a determination by experts that defendant was insane at the time of the offense does not compel a finding that defendant is incompetent to stand trial. Hearings at this stage are solely on the issue of competence, the issue of sanity is a determination to be made by the jury.

b. At Trial

All parties, and the court, are under an affirmative duty to ensure defendant's competence at trial. *State v. Starcevich*, 139 Ariz. 378, 678 P.2d 959 (App. Div. 2 1983). This duty continues throughout the trial. The standard is the same as that of the pre-trial stage: defendant must be able to understand the proceedings and assist in his defense. Rule 11.1.

c. At Sentencing

Rule 26.5 permits the court to order a psychiatric examination of the defendant prior to sentencing. The judge may order the examination to ascertain defendant's competence or to investigate possible mitigation under A.R.S. § 13-701(E)(2) which reads:

> The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

*See also* A.R.S. § 13-751(G)(1) (identical mitigation factor in death penalty statute), and this Volume of the Prosecutor's Manuals, "Rule 26."

The proper standard for defendant's competence at sentencing is whether defendant can understand the proceedings. *State v. Montano,* 136 Ariz. 605, 667 P.2d 1320 (1983); Rule 11.1.

d. Before Execution of Sentence

Arizona law specifically prohibits execution of a prisoner who becomes insane after sentencing but before execution. A.R.S. § 13-4021. A.R.S § 13-4021-4024 detail the procedure to be followed in this circumstance. Caveat: The Arizona Supreme Court maintains that statutes defining procedure are an invasion of their power to write the rules of procedure and they have held such statutes unconstitutional. *See State v. Pima County Superior Court (Aherns)*, 154 Ariz. 574, 744 P.2d 675 (1987)(A.R.S. § 28-692(K) is unconstitutional as an infringement of the supreme court's rule making power); *State v. Druke,* 143 Ariz. 314, 693 P.2d 969 (App. Div. 2 1984) (A.R.S. § 13-3993, examination, privilege, etc. of

defendant pleading not guilty by reason of insanity, is unconstitutional when the statute conflicts with the rule). Furthermore, the U.S. District Court has found due process deficiencies with these competency statutes. *Amaya-Ruiz v. Stewart*, 136 F.Supp.2d 1014 (D. Ariz. 2001).

There is no comparable statutory provision for prisoners who become incompetent while serving their sentence. Once the prisoner is confined by the Department of Corrections, his incompetence is handled administratively. If the prisoner is found incompetent, the time spent in the treatment facility is counted toward his sentence, but the prisoner may not acquire release credits or "good time" credit.

e. Subsequent Hearings - Waiver of Constitutional Rights

A determination of competence to stand trial is inadequate to meet the test for waiver of a constitutional right. *Westbrook v. Arizona,* 384 U.S. 150, 86 S.Ct. 1320 (1966). If a defendant's competence is at issue, the court must determine if the higher level of competence exists to waive the constitutional right and so find on the record. *Sieling v. Eyman,* 478 F.2d 211 (9th Cir. 1973). The defendant's competence is at issue if it has been raised by motion (*Sieling, supra*) or if the court has sufficient evidence to question defendant's competence. *State v. Wagner,* 114 Ariz. 459, 561 P.2d 1231 (1977) (defendant brutally attacked his cellmate during course of trial and had a history of psychotic behavior).

A separate hearing on the issue is not necessary if the court can determine from evidence before it that defendant is competent. *State v. Contreras,* 112 Ariz. 358, 542 P.2d 17 (1975) (reports on competence to stand trial included determination of competence to plead guilty); *State v. Bishop,* 137 Ariz. 5, 667 P.2d 1331 (App. Div. 2 1983) (competency had been extensively reviewed, judge had ample opportunity to observe defendant). The court may consider earlier reports in making its determination (*Contreras* and *Bishop*, *supra*) or may request an expert opinion to assist in determining if reasonable grounds exist to order a subsequent hearing under Rule 11. *Id.*

The best strategy here is to request a determination during the competency exam as to defendant's ability to knowingly and intelligently waive his constitutional rights (i.e., pleading guilty, waiving a jury trial, waiving counsel). This conclusion by the experts that defendant is competent to waive his constitutional rights will preclude subsequent hearings unless there is sufficient evidence that defendant has become incompetent after the original finding of competency. *Contreras*, *supra*. *See Chavez v. United States*, 656 F.2d 512 (9th Cir. 1981).

C. Reasonable Grounds

After a motion has been filed under Rule 11.2, the judge must determine if reasonable grounds exist for an examination of the defendant's competency to stand trial. The determination of reasonable grounds is a factual question to be decided on a case by case basis. *State v. Ferguson,* 26 Ariz.App. 285, 547 P.2d 1085 (App. Div. 2 1976). The trial judge has broad discretion in making this determination and that decision will not be overturned absent manifest abuse. *State v. Ohta*, 114 Ariz. 489, 562 P.2d 369 (1977); *State v. Verdugo*, 112 Ariz. 288, 541 P.2d 388 (1975).

"Reasonable grounds exist if there is sufficient evidence to believe that the defendant is not able to understand the nature of the proceedings against him and to assist in his defense." *State v. Steelman,* 120 Ariz. 301, 315, 585 P.2d 1213, 1227 (1978), citing *State v. Bradley*, 102 Ariz. 482, 433 P.2d 273 (1967)

and *State v. Messier,* 114 Ariz. 522, 562 P.2d 402 (App. Div. 1 1977). *See also State v. Kuhs*, 223 Ariz. 376, 224 P.3d 192 (2010). "Evidence is sufficient when it creates a doubt in the court's mind as to defendant's competency." *State v. Borbon,* 146 Ariz. 392, 395, 706 P.2d 718, 721 (1985).

1. Preliminary Hearing ("Pre-Screen")

The judge may hold a preliminary hearing to determine the reasonable grounds question. *State v. Messier,* 114 Ariz. 522, 562 P.2d 402 (App. Div. 1 1977). As part of this preliminary hearing, the court may request a pre-Rule 11 screening by a qualified expert (see Rule 11.3(b)). If the judge reasonably concludes that no reasonable grounds exist, the motion may be denied and the proceedings will continue. *State v. Williams,* 166 Ariz. 132, 800 P.2d 1240 (1987); *State v. Borbon,* 146 Ariz. 392, 706 P.2d 718 (1985).

The court must be careful not to substitute this preliminary hearing for a determination on the issue of competence. The Ninth Circuit is instructive on how the judge should reach the determination.

> Ninth Circuit cases make clear that a good faith doubt arises when there is "substantial evidence" of incompetence. In determining whether there is substantial evidence the trial court should consider all information properly before it and evaluate the probative value of each piece of evidence in light of the others. In deciding whether a hearing is necessary, the court must accept as true all evidence of incompetence since it may find such evidence not credible only after the actual competency hearing. Evidence of incompetence may include, but is not limited to, the existence of a history of irrational behavior, medical opinion, and the defendant's demeanor at trial. In other words, at any time there appears from any source substantial evidence of defendant's incompetence, there is a good faith doubt that cannot be dispelled by resort to conflicting evidence and the trial court *sua sponte* must order an evidentiary hearing on the competency issue.

*Evans v. Raines,* 534 F.Supp. 791 (D.Ariz. 1982), *rev'd on other grounds* 705 F.2d 1479 (9th Cir. 1983) (internal citations omitted).

2. Duty of Judge

The judge, the defendant's attorney and the prosecutor all have a duty to see that an incompetent defendant is not tried. *State v. Starcevich*, 139 Ariz. 378, 389, 678 P.2d 959, 970 (App. Div. 2 1983).

In Arizona, evidence of defendant's incompetency may come before the court through a motion filed by counsel, through the judge's own observations of the defendant during the proceeding, or by way of defendant's history of mental problems which should reasonably be known to the judge (i.e., if the defendant has raised a defense of insanity which implicates a disorder or mental defect that might affect defendant's competence or past convictions and commitments indicating a history of mental problems). *See Pate v. Robinson,* 383 U.S. 375, 86 S.Ct. 836 (1966) (defendant's history of disruptive, psychotic behavior was improperly ignored in the determination of competence).

However, the judge must have actual knowledge of the evidence of incompetence and is under no burden to raise the issue if defendant does not appear incompetent or present other evidence of

incompetence. *State v. Decello,* 111 Ariz. 46, 523 P.2d 74 (1974). Defendant does not raise the issue of incompetence simply by asserting the defense of insanity. *State v. Steelman,* 120 Ariz. 301, 585 P.2d 1213 (1978). The knowledge of incompetence may not be imputed to the judge. *State v. DeVote,* 87 Ariz. 179, 349 P.2d 189 (1960) (prior civil petition in same court before different judge was not before trial judge and could not be considered reasonable grounds).

3. Burden for Additional Hearings

Once defendant's competence has been determined by examination and hearing under Rule 11, there must be additional evidence presented to warrant a second (or third, etc.) examination and hearing. In determining whether additional examinations are necessary, the judge may consider the reports and testimony from the first hearing, and the judge's own observations of the defendant. *State v. Bishop,* 137 Ariz. 5, 667 P.2d 1331 (App. Div. 2 1983).

4. Cases - Reasonable Grounds

a. No Reasonable Grounds

*State v. Harrod*, 218 Ariz. 268, 183 P.3d 519 (2008).

> A defendant's choice not to cooperate in presenting mitigation evidence does not give rise to reasonable grounds to grant a competency hearing, especially when defense counsel concedes that the defendant understood the proceedings.

*State v. Djerf*, 191 Ariz. 583, 959 P.2d 1274 (1998).

> A defendant's dissatisfaction with his attorney does not constitute reasonable grounds to order a competency hearing, absent some indication that the defendant was irrational or delusional. In reviewing the record, the appellate court found no evidence that defendant acted irrationally when he asked to proceed *in propria persona*. *See also State v. Johnson*, 147 Ariz. 395, 710 P.2d 1050 (1985).

*State v. Williams,* 166 Ariz. 132, 800 P.2d 1240 (1987).

> Defendant was contemplating raising the defense of insanity and produced results from examinations conducted in 1964 and 1970. The trial court properly found no reasonable grounds existed where no connection between the earlier diagnosis of incipient, but progressing, undifferentiated schizophrenia, and the crimes. Nothing in the manner in which the crime as committed or defendant's later actions suggested he was insane at the time of the crime. (Note: This is an insanity defense case, defendant's competence to stand trial was not raised.)

*State v. Ohta,* 114 Ariz. 489, 562 P.2d 369 (1977).

> Defendant requested to be sent to prison rather than be placed on probation. Defense counsel moved for an examination under Rule 11. The trial court denied the motion as there was no evidence to indicate that defendant did not understand the proceedings. The appellate court found no error. Although the defendant's request was unusual, it was not reasonable grounds for an examination under Rule 11.

*State v. Verdugo,* 112 Ariz. 288, 541 P.2d 388 (1975).

Defense counsel's assertions of defendant's low intelligence, moodiness, confusion and inability to relate facts clearly were insufficient, absent other evidence, to support a Rule 11 motion. *See also State v. Thomas,* 78 Ariz. 52, 56, 275 P.2d 408, 411 (1954), *overruled on other grounds, State v. Pina*, 94 Ariz. 243, 383 P.2d 167 (1963).

*State v. Decello,* 111 Ariz. 46, 523 P.2d 74 (1974).

A competent defendant sought to waive his right to a jury. The court accepted the waiver without inquiring into defendant's competence. On appeal, the defendant argued that *Westbrook v. Arizona,* 384 U.S. 150, 86 S.Ct. 1320 (1966), required a competency hearing whenever a defendant waives a constitutional right.

The appellate court disagreed and found that such an inquiry is required only if defendant's mental competence is at issue. The court also found that if defendant is competent to waive a right, no hearing is required for him to waive other rights in the same "class" (e.g. constitutional rights).

*State v. DeVote,* 87 Ariz. 179, 349 P.2d 189 (1960).

Defendant's mother filed a petition for civil commitment after defendant's arrest, but before trial. The petition was filed in the civil division of the same court where the criminal proceedings were to be held. No evidence or mention of defendant's incompetence was introduced at the criminal trial.

On appeal, the defendant claimed the judge had reasonable grounds to *sua sponte* move for an examination under Rule 11 based on the civil petition filed in the "same court."

The appellate court disagreed and found that the judge at the criminal trial had no imputed knowledge of defendant's incompetence as a result of the civil petition. Defense counsel should have raised the issue at the start of the proceedings.

b. No Reasonable Grounds for a Second Hearing

*State v. Lynch*, 225 Ariz. 27, 234 P.3d 595, 601 (2010).

Before trial, the court ordered a Rule 11 examination after the defendant refused to meet with his lawyers. The defendant was found incompetent to stand trial and ordered restoration services. Several months later, after considering a stipulated psychologist's report that mentioned the defendant suffered from various delusions that did not affect his ability to understand the proceedings or assist in his defense, the court found the defendant restored to competency. Six months later, defense counsel moved for a second Rule 11 evaluation based on the defendant's delusions. The trial court denied the motion because defense counsel provided no new information. The appellate court found no error in the refusal to order the second evaluation.

*State v. Amaya-Ruiz*, 166 Ariz. 152, 800 P.2d 1260 (1990).

> Trial judge granted the defendant's first motion for a Rule 11 hearing, at which he was found competent to stand trial based on the expert's report that defendant's uncooperative attitude had more to do with his advice from other inmates than any psychological problems. Defendant repeated statements to his attorney that he did not understand the proceedings did not require that an additional Rule 11 examination be held where he refused to discuss his case with his attorney.
>
> The defendant's also created two courtroom outbursts in the jury's presence, but the appellate court found that conduct intended to disrupt the judicial process is insufficient to require an additional Rule 11 examination after an initial determination of competency.
>
> Defendant also attempted suicide twice before his initial Rule 11 competency determination and once shortly afterward. The court held that, "standing alone, a suicide attempt has not been held to mandate a Rule 11 examination," and further held that the trial court did not abuse its discretion in refusing to hold a second hearing where the court had the record made on previous occasions.

*State v. Berger,* 171 Ariz. 117, 120, 828 P.2d 1258, 1261 (App. Div. 2 1992).

> After defendant was restored to competency and just before trial began, defense counsel moved for a second Rule 11 hearing based on the defendant's prior history of mental illness and numerous hospitalizations and the doctor's opinion that the defendant would become incompetent when he did not take his medication. The trial court did not error in denying the motion for a second hearing where the court questioned the defendant about whether he was taking his medication, understood the proceedings and was oriented to time, place, and person.

*State v. Taylor,* 160 Ariz. 415, 418, 773 P.2d 974, 977 (1989).

> During the first Rule 11 evaluation, the defendant spoke to one expert who informed the court he was competent to stand trial. However, the defendant refused to talk to the second appointed expert on the advice of an out-of-state attorney. On the eve of trial, the defendant sought a second evaluation because he erroneously followed the other attorney's advice. The appellate court held that the trial court did not abuse its discretion in denying the motion where the defendant appeared competent to stand trial and defense counsel gave no indication that the defendant was unable to understand the proceedings and assist in his defense.

*State v. Walton*, 159 Ariz. 571, 577, 769 P.2d 1017, 1023 (1989).

> Defense counsel moved for a Rule 11 evaluation and was found competent after a psychologist found the defendant displayed no signs of incompetency or insanity. After the denial, counsel made several additional Rule 11 motions for evaluation based on the existence of a childhood history of psychiatric referrals and blackouts caused by substance abuse. The appellate court upheld the trial court's finding that these matters were not relevant to a competency determination.

*State v. Harding,* 137 Ariz. 278, 286, 670 P.2d 383, 391 (1983), cert. denied 465 U.S. 1013.

After several attempts to examine defendant, competence was determined based on reports of experts submitted to the court. When the defendant sought to waive counsel, a motion was made to have his competence to waive counsel evaluated. The court reviewed the facts before it, including the prior determination of competence, defendant's education and experience with the justice system, and the defendant's conduct in court. The trial court concluded the defendant was competent to waive counsel.

On appeal, the defendant claimed the trial court had failed to consider an earlier diagnosis of organic brain syndrome in its determination. The appellate court found no error. "Mere diagnosis of a mental disease or disorder does not mean that the defendant is unable to make rational decisions regarding his case."

*State v. Bishop,* 137 Ariz. 5, 8, 667 P.2d 1331, 1334 (App. Div. 2 1983).

Defendant was examined pursuant to a Rule 11 motion and found incompetent. He was examined again 3 months later and found competent. One month prior to trial (9 months after the second exam), the defense moved to have defendant examined again following an attempted suicide. The court ordered an exam by a psychiatrist as part of the preliminary hearing to determine if reasonable grounds existed. After reviewing the report of the psychiatrist, the prior determination of competence, and defendant's behavior before the court, the trial judge denied the motion. The appellate court ruled there was no abuse of discretion as the trial court did not substitute the preliminary hearing for a determination of competency, but properly found there was no reasonable cause. The appellate court also found the petition deficient because it was based only upon counsel's assertions and a newspaper article.

*State v. Steelman,* 120 Ariz. 301, 315, 585 P.2d 1213, 1227 (1978).

Defendant was found competent to stand trial. Several months later, the defense moved for a second determination after defendant reported hallucinations and uncontrollable episodes of violence. The judge contacted one of the psychiatrists who examined the defendant for the earlier Rule 11 motion. The psychiatrist reported that defendant was most likely faking the episodes to obtain drugs. The judge then contacted a local M.D. who examined defendant and prescribed a medication recommended by the psychiatrist. Defendant refused the medication. The judge denied the motion for the second exam but said he would monitor the defendant closely.

The appellate court found the denial proper based on the evidence before the court.

*State v. Messier;* 114 Ariz. 522, 526, 562 P.2d 402, 406 (App. Div. 1 1977).

Defendant was found competent to stand trial or plead guilty pursuant to Rule 11 motions made during proceedings involving burglary charges. He was given probation following a guilty plea. Three months later, defendant was arrested and charged with three counts of auto theft. His counsel moved for a Rule 11 examination. The court dismissed the motion for lack of specificity. Defendant tried again and was again denied. The trial judge considered the determination of the earlier Rule 11 exam (different case) and specifically found no substantial new or different evidence had been presented to show defendant was not able to understand the proceedings against him or assist

in his own defense." The same judge was involved in both proceedings.

No error. The first competency determination was near in time to the second motion and the judge considered other evidence as well.

c. Court Should Have Found Reasonable Grounds

*State v. Wagner,* 114 Ariz. 459, 561 P.2d 1231 (1977).

The defendant was found competent to stand trial. During the pendency of the trial, defendant brutally attacked his cellmate and exhibited other bizarre behavior. Shortly after the attack, defendant withdrew his not guilty plea and pled guilty. The court accepted the plea without inquiring into defendant's competence to plead guilty.

The appellate court reversed for a determination of defendant's competence to plead guilty for two reasons: 1) a higher level of competence is required to plead guilty; and 2) the behavior of the defendant and his long history of psychotic behavior were reasonable grounds to question his competence to plead guilty.

*State v. Contreras,* 112 Ariz. 358, 360, 542 P.2d 17, 19 (1975).

Defendant was found competent to stand trial. Defendant pled guilty and the trial judge accepted the plea without holding a second hearing on defendant's competence to plead guilty. On appeal, the defendant claimed this failure to hold a second hearing violated the Ninth Circuit rule of *Selling v. Eyman,* 478 F.2d 211 (9th Cir. 1973).

The appellate court found no error. The court rejected the ruling in *Selling* and ruled that, although there is a higher level of competence required to waive counsel, two hearings are not required if the court has sufficient evidence before it to make a determination (i.e. reports that find a defendant competent to plead guilty).

D. "Mental Illness or Defect" Required

1. A Threshold Question

A person must suffer from a "mental illness or defect" in order to be protected by Rule 11. Arizona criminal statutes and rules of criminal procedure are devoid of a definition for this phrase. The definition is rarely argued at the trial level and the prosecutor will usually rely on the experts to determine whether defendant's claimed illness meets the requirement. Some definitions are available which should clarify the term for you.

A.R.S. § 36-501(26) defines "mental disorder" as "a substantial disorder of the person's emotional processes, thought, cognition or memory." The statute distinguishes mental disorder from:

> (a) Conditions that are primarily those of drug abuse, alcoholism or mental retardation, unless, in addition to one or more of these conditions, the person has a mental disorder.

(b) The declining mental abilities that directly accompany impending death.

(c) Character and personality disorders characterized by lifelong and deeply ingrained antisocial behavior patterns, including sexual behaviors that are abnormal and prohibited by statute unless the behavior results from a mental disorder.

*Id.*

These exceptions imply that disorders of lifelong duration or organic origin (i.e., mild retardation, anti-social personality, organic brain syndrome, etc.) are not generally a basis for a plea of incompetence standing on their own. These exceptions are echoed in the definition for "mental disorder" provided in DSM-IV-TR:

> **MENTAL DISORDER:** In DSM-IV, each of the mental disorders is conceptualized as a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e. impairment in one or more important areas of functioning), or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom. In addition, this syndrome or pattern must not be merely an expectable and culturallly sanctioned response to a particular event, for example, the death of a loved one. Whatever its original cause, it must currently be considered a manifestation of a behavioral, psychological, or biological dysfunction in the individual. Neither deviant behavior, (e.g., political, religious, or sexual) nor conflicts that are primarily between the individual and society are mental disorders unless the deviance or conflict is a symptom of a dysfunction in the individual, as described above.

American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision. Washington, DC, American Psychiatric Association, 2002 at p. xxxi. (Emphasis added.)

Thus, there is a threshold question that must be overcome in competency determinations: Defendant must suffer from a mental illness or defect and this mental illness or defect must render him unable to understand the proceedings against him or to assist in his own defense. By definition, "mental illness or defect" is a psychological (not physical) disruption of the defendant's mental processes, that is of identifiable origin (not lifelong deviance or organic) and is theoretically temporary (amenable to treatment).

2. Limitations of Mental Illness or Defect

a. Amnesia

In *State v. Ferguson,* 26 Ariz.App. 285, 547 P.2d 1085 (App. Div. 2 1976), the defendant claimed that his organic amnesia rendered him incompetent because he could not remember his side of the story and, therefore, could not assist counsel. The appellate court adopted the following criteria in upholding the trial court's analysis of competence. The court should consider:

1) The extent to which the amnesia affected the defendant's ability to consult with and assist his lawyer.

2) The extent to which the amnesia affected the defendant's ability to testify in his own behalf.

3) The extent to which the evidence in suit could be extrinsically reconstructed in view of the defendant's amnesia. Such evidence would include evidence relating to the crime itself as well as any reasonably possible alibi.

4) The extent to which the Government assisted the defendant and his counsel in that reconstruction.

5) The strength of the prosecution's case. . . . If there is any substantial possibility that the accused could, but for his amnesia, establish an alibi or other defense, it should be presumed that he would have been able to do so.

6) Any other facts and circumstances which would indicate whether or not the defendant had a fair trial.

*Citing Wilson v. United States,* 391 F.2d 460 (1968).

The philosophical origins of the refusal to allow an amnesiac to go free are set forth in *State v. McClendon,* 103 Ariz. 105, 437 P.2d 421 (1968). The Arizona Supreme Court adopts the viewpoint that all defendants suffer from some degree of amnesia and that an amnesic defendant is not less competent than a defendant who claims insanity at the time of the crime or heavy intoxication resulting in a blackout. Further, because there is a very real possibility of malingering, releasing a defendant who remembers nothing "will greatly jeopardize the safety and security of law-abiding citizens and render the protection of Society from crime and criminals far more difficult than ever before in modern history." *Id*.

b. Organic Brain Syndrome

The diagnosis of organic brain syndrome is insufficient to support a finding of incompetence absent additional evidence that defendant is unable to participate in his defense. *State v. Harding,* 137 Ariz. 278, 670 P.2d 383 (1983) cert. denied 465 U.S. 1013.

c. Paranoid Schizophrenia

"This label alone, however, does not mean that appellant is unable to make competent choices." *State v. Evans,* 125 Ariz. 401, 403 610 P.2d 35 (1980).

d. Schizoid Personality

Defendant's "schizoid personality" was not shown to interfere with his ability to make decisions about defense and assist counsel. *State v. Thompson,* 113 Ariz. 1, 545 P.2d 925 (1976).

It seems the defendant has two personalities: Mr. Startino and Mr. Freeman. While Mr. Startino wasn't looking, Mr. Freeman stole a car. At trial, defendant claimed Mr. Startino didn't know about

the theft and could not be found guilty of knowingly stealing the car. The jury convicted Mr. Freeman -- Mr. Startino failed to make an appearance in his own defense and will be accompanying Mr. Freeman to prison. *State v. Freeman,* 404 N.W.2d 188 (Iowa App. 1987).

### 3. Expert Testimony

Prosecutors must rely heavily on experts and their opinions whenever competency is an issue. As a prosecutor, you must be familiar with their terminology, their methods and what they are really saying when they testify. If you are confused, the jury will be confused.

Another danger is your expertise in the area. You may have educated yourself enough that you understand what the expert is saying, but the jury might not. Keep an eye on the jury and try to make sure the lowest level juror understands.

#### a. DSM-IV-TR

The source most psychiatrists and psychologists use for their diagnosis is the Diagnostic and Statistical Manual of Mental Disorders (the DSM). This is now published in its fourth revised edition and is denominated DSM-IV-TR. DSM-IV-TR is a catalog of the mental disorders currently recognized by the mental health profession. You should never go to court on an incompetence issue without reading the introduction and the description of the illness claimed by defendant. This information must be made available to you under Rule 11.4 and 15.2.

Reading the introduction and the descriptions of research and diagnostic methods will give you much insight into how an expert arrives at a diagnosis. Once you know the method, you can identify the weaknesses.

The Introduction to DSM-IV-TR is full of qualifications, cautions and retractions which should provide great fodder for cross-examination. DSM-IV-TR also contains the following "Cautionary Statement" on page xxxvii:

> The specified diagnostic criteria for each mental disorder are offered as guidelines for making diagnoses, since it has been demonstrated that the use of such criteria enhances agreement among clinicians and investigators. The proper use of these criteria requires specialized clinical training that provides both a body of knowledge and clinical skills.
>
> These diagnostic criteria and the DSM-IV Classification of mental disorders reflect a consensus of current formulations of evolving knowledge in our field. They do not encompass, however, all the conditions for which people may be treated or that may be appropriate topics for research efforts.
>
> The purpose of DSM-IV is to provide clear descriptions of diagnostic categories in order to enable clinicians and investigators to diagnose, communicate about, study, and treat people with various mental disorders. It is to be understood that inclusion here, for clinical and research purposes, of a diagnostic category such a Pathological Gambling or Pedophilia does not imply that the condition meets legal or other non-medical criteria for what constitutes mental disease, mental disorder, or mental disability. The clinical and scientific

> considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability determination, and competency.

American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision. Washington, DC, American Psychiatric Association, 2002 at p. xxxvii. (Emphasis added.)

If you catch an expert using an outdated version of DSM to make his diagnosis, refer to the appendix in the most recent manual that outlines the changes and additions made to the older version. Often the newer version includes changes that accrue to your advantage, and it will certainly discredit the expert who is not up-to-date. These changes occur more often than you might suspect. DSM-III was published in 1980; drafts of the revision were published in October, 1985 and August, 1986; DSM-III-R was published in May, 1987; and DSM-IV was published in 1994. *Id*. at xxiv-xxix. Use this constant change to your advantage in court.

For a more complete discussion of how to work with mental health experts, see "Insanity," this manual.

E. Defendant's Statements - Rule 11.7

Rule 11.7 contains two prohibitions on the use of evidence obtained during mental examinations.

a. No information discovered as a result of this examination shall be used against defendant unless he raises the defense of insanity.

b. No statement of the defendant relating to the events which form the basis of the charges against defendant shall be used against him without his consent.

If defendant is examined for purposes of determining his competence to stand trial, no information or statements gathered in that examination may be used for any purpose unless defendant raises the defense of insanity. Even if he does raise the defense of insanity, none of his statements relating to the charges against him may be used without his consent.

Ordering a mental examination does not, in and of itself, violate a defendant's privilege against self-incrimination. *State v. Schackart*, 175 Ariz. 494, 858 P.2d 639 (1993).

1. Consent

a. Competency Determinations

Consent to use defendant's statements must be affirmatively set out in the record. Failure to object to the use of statements will not waive the privilege created by Rule 11.7. *State v. Vickers,* 129 Ariz. 506, 633 P.2d 315 (1981); *State v. Steelman,* 120 Ariz. 1213, 585 P.2d 1213 (1978) (no implied waiver where exam took place before the insanity defense was raised; issue not fully addressed by the court but result implied); *See State v. Magby,* 113 Ariz. 345, 554 P.2d 1272 (1976).

b. Insanity Raised

If the defendant raises the defense of insanity, information obtained during competency determinations may be used. Rule 11.7(a). This does not include defendant's actual statements. *State v. Mauro,* 149 Ariz. 24, 716 P.2d 393 (1986)(use of defendant's statements to be strictly avoided), *rev'd on other grounds*, 107 S.Ct. 1931 (1987). The Arizona Court of Appeals, Division 1, found an implied consent to the use of defendant's statements on the issue of insanity where they are elicited in cross-examination of the psychiatrist called as a witness by the defense. *State v. Tallabas,* 155 Ariz. 321, 746 P.2d 491 (App. Div. 1 1987). By raising the insanity defense and calling the witness to prove insanity, the defendant "consented to a thorough cross-examination of the doctor by the state, a cross-examination that probed and tested the bases of the doctor's opinion of insanity and exposed any statements by defendant to the doctor insofar as they underlay or related to that opinion." (Emphasis added.) *Id*.

Previously, the court of appeals had distinguished cases where the doctor testified that defendant's statements were the basis of his opinion from cases where the doctor testified to the actual content of defendant's statements. The former was admissible, the latter was not. *See State v. Torres,* 127 Ariz. 309, 620 P.2d 224 (App. Div. 2 1980). This distinction appears to have been removed, at least under the facts of *Tallabas*.

In other circumstances, the statute is clear: The doctor may not testify to the actual statements of the defendant without his consent. *State v. Ramirez*, 116 Ariz. 259, 269, 569 P.2d 201, 211 (1977).; *State v. Magby*, 113 Ariz. 345, 554 P.2d 1272 (1976). Nor may the doctor testify indirectly to defendant's statements by implying that defendant made incriminating statements to him. *State v. Freeman,* 114 Ariz. 32, 559 P.2d 152 (1976).

c. Defendant's Actions, etc. During Examination

In *Torres, supra,* and *Mauro, supra,* the court also held that an expert may testify to defendant's state of mind and actions during the examination because neither relates to the basis of the criminal charges against defendant.

2. A Fifth Amendment Privilege

The courts have consistently ruled that the only privilege that exists during a court ordered examination is that conferred by Rule 11.7. *State v. Steelman,* 120 Ariz. 301, 585 P.2d 1213 (1978). This protection does not arise from any physician/client relationship, *State v. Evans*, 104 Ariz. 434, 454 P.2d 976 (1969), but rather rises from the Fifth Amendment protection against self-incrimination. Cf. *State v. Mauro*, 149 Ariz. 24, 716 P.2d 393 (1986).

a. *Miranda* Invocation Admissible on the Issue of Voluntariness

In *State v. Carrillo,* 156 Ariz. 125, 750 P.2d 883 (1988), the defendant argued his confession was involuntary because he was incapable (incompetent-retarded) of understanding his *Miranda* rights. With the court's permission, the prosecutor elicited testimony from a police psychologist about defendant's invocation of his *Miranda* rights after speaking with the police for a period of time. The defendant claimed that this was an unconstitutional use of his invocation of his constitutional rights. The Arizona Supreme Court disagreed.

> The evidence was relevant to the key issue in the case - the voluntariness and reliability of defendant's confession, which was the only substantial evidence connection him with the crime. On final argument, the prosecutor pressed the point home to the jury. . . . We do not believe the implicit promise of freedom from penalty recognized in *Doyle* and *Wainwright* embraces the concept that defendant may simultaneously claim his rights and, without fear of contradiction claim that he did not understand the rights he claimed. We hold that evidence of exercise of *Miranda* rights was admissible on the question of comprehension of those rights.

*Id*. at 132, 750 P.2d at 889.

3. Harmless Error

If the testimony is erroneously admitted, the error may be found harmless under criteria similar to that of erroneously admitted statements under *Miranda.* Cf. *State v. Torres,* 127 Ariz. 309, 620 P.2d 224 (App. Div. 2 1980) (if error, harmless, in view of overwhelming evidence against defendant); *State v. Ramirez,* 116 Ariz. 259, 569 P.2d 201 (1977) (error, but harmless, merely cumulative and defendant did not rebut or attempt to rebut the evidence); *State v. Magby,* 113 Ariz. 345, 554 P.1d 1272 (1976) (error, but harmless, other evidence overwhelming); *State v. Freeman,* 114 Ariz. 32, 559 P.2d 152 (1976) (error, but harmless, overwhelming evidence against the defendant).

## II. RULE 11 - THE PROCEDURE

### A. Charging Considerations

There are three situations when a defendant's mental competence may affect your charging decision: (1) when defendant is incompetent and unlikely to recover; (2) when the defendant is retarded and incompetent, and, (3) when the defendant is severely retarded.

#### 1. Defendant Incompetent, Unlikely to Recover

Even though an indictment or information is required before the defendant's mental status may be examined under Rule 11.2, there are times when it is obvious that a particular defendant is incompetent and unlikely to recover. For example, every county has its share of chronic mentally ill persons. These people have committed crimes and will continue to do so but have been found incompetent to stand trial and unlikely to recover. The best method may be to try a civil commitment under A.R.S. §§ 36-533 through 544. If that fails, a criminal prosecution may be the only alternative, even in the face of a pretty good insanity defense or incompetence defense.

In order to commit a person involuntarily, the court must find the person is, as a result of a mental disorder, either a danger to himself, a danger to others, or gravely disabled. See definitions A.R.S. § 36-501. Once these factors are established, the court may commit the defendant for 90 days (if a danger to self), for 180 days (if a danger to others) or for 365 days (if gravely disabled). The commitment is subject to review at the end of these time periods. If the patient is deemed to have recovered (that is to say he no longer fits the categories above), he will be released. This does not mean he is then competent to stand trial.

When considering whether to charge these individuals, err on the side of caution. If charged, Rule 11 will provide the necessary avenues for inquiry into defendant's competence. If not charged, you, have made the determination of defendant's competency.

2. The Incompetent/Retarded Defendant

If a defendant is found incompetent and unlikely to recover because of mental retardation, he may not be committed unless he also suffers from a mental disorder as defined by A.R.S. § 36-501(26)(a). This "loophole" in the law is created by definitional differences between Rule 11 and A.R.S. § 36-501, *et seq*. *Vanderheiden v. Superior Court In and For County of Maricopa*, 182 Ariz. 370, 897 P.2d 672 (App. Div. 1 1994). A defendant may be unable to assist counsel and understand the proceedings against him because he is retarded. Under Rule 11, he cannot be tried. However, A.R.S. § 36-501(26)(a) specifically exempts retardation from the definition of a mental disorder, which is requisite to civil commitment.

3. The Retarded Defendant

Generally, the courts are reluctant to find a retarded defendant incompetent unless there is also a mental illness or a physical handicap. This is true even in cases where the IQ is very low (50 or below). For a good list of cases from across the nation dealing specifically with the problems of the mentally retarded defendant, see *Competency to Stand Trial of Criminal Defendant Diagnosed as "Mentally Retarded" -- Modern Cases*, 23 A.L.R. 4th 493 (1986 and 2010 Supp.). This annotation presents a comprehensive analysis of national cases in categories such as "IQ 50 or below - defendant competent," and "IQ 50 or below - defendant incompetent."

Arizona case law is sparse in this area. Only one case, *State v. Davis,* 106 Ariz. 598, 480 P.2d 354 (1971), discusses the issue of the mentally retarded defendant. In *Davis,* the court remanded for a competency hearing where the record showed defendant had an IQ between 60 and 70, but the record was deemed insufficient to support of finding that defendant was competent to plead guilty. The court relied on the statutory predecessor to Rule 11 and found a hearing was required, but failed to set out any guidelines for analyzing the competency issue.

Even though a low IQ may not be reasonable grounds to find the defendant incompetent, it may interfere during your trial. If defendant can establish that the retardation is severe enough to negate the intent of the crime charged, he may only be found guilty of the lesser included, general intent crime. *See State v. Druke,* 143 Ariz. 314, 693 P.2d 969 (App. Div. 2 1984). The defendant's retardation may also be considered in mitigation of the sentence under A.R.S. § 13-701(E).

4. Juvenile Proceedings

Rule 11 may be invoked in juvenile proceedings because "the determination of mental competency of a juvenile is one of those instances where the procedure followed in adult prosecution must be applied to juvenile cases." *State ex rel. Danday v. Superior Court,* 127 Ariz. 184, 619 P.2d 12, 15 (1980). *See also Johnson v. Rose,* 126 Ariz. 127, 613 P.2d 287 (1980) (due process requires a determination of competency before delinquency adjudication).

### B. A Motion is Made Under Rule 11

Remember, the motion under Rule 11 may be filed by any party at anytime. All parties are under a continuing duty to ensure the competence of the defendant and, therefore, the court may move *sua sponte* to have the mental condition of the defendant examined. When the defense motion is made, the prosecutor may have two functions: 1) to oppose the motion and 2) to make sure the proper determinations are made at the examination.

#### 1. Opposing the Motion

Once the motion is filed, you must seriously consider whether you want to oppose the motion. This is not a circumstance where it is always in the state's best interest to oppose the defense. If a defendant is obviously incompetent or if her competence is questionable and competence is not determined, at the very least, the case will be remanded for consideration of the competence issue. It may be reversed entirely. The prosecutor's role here is to make sure the defendant is competent to stand trial and/or to plead guilty or waive her Constitutional rights. For this reason, you may find yourself in the position of requesting the competency determination to avoid the issue on appeal, or not opposing the defense motion.

In cases where it is appropriate to oppose the motion, you may do do so by challenging the sufficiency of the petition or challenging for lack of reasonable grounds.

##### a. Sufficiency of the Petition

A motion or petition which lacks specific enumeration of the facts upon which the examination is sought may be dismissed. Of course, defendant is free to try again as there are no limitations within Rule 11 on the number of times motions for determination of competency may be filed. *See State v. Messier,* 114 Ariz. 522, 562 P.2d 402 (App. Div. 1 1977).

##### b. Counsel's Assertions Insufficient

The assertions of counsel, without additional evidence, are insufficient to support a motion under Rule 11. *State v. Bishop,* 137 Ariz. 5, 667 P.2d 1331 (App. Div. 2 1983); *State v. Verdugo,* 112 Ariz. 288, 541 P.2d 388 (1975).

##### c. Lack of Reasonable Grounds

When opposing a Rule 11 motion on lack of reasonable grounds, you should first request a preliminary hearing on the reasonable grounds issue. *State v. Lane,* 128 Ariz. 360, 625 P.2d 949 (App. Div. 2 1981). *State v. Messier,* 114 Ariz. 522, 562 P.2d 402 (App. Div. 1 1977). Request also that the defendant be given a pre-Rule 11 screening as part of the preliminary hearing. *State v. Borbon*, 146 Ariz. 392, 706 P.2d 718 (1985).

The judge's decision on reasonable grounds may be based on this pre-Rule 11 screening (*Messier*, *supra*), prior determinations of competence and/or the judge's own observation of the defendant. *State v. Bishop,* 137 Ariz. 5, 667 P.2d 1331 (App. Div. 2 1983). The determination on reasonable

grounds will not be overturned absent a manifest abuse of discretion. *State v. Ortiz,* 117 Ariz. 264, 571 P.2d 1060 (App. Div. 2 1977).

For further illustration and discussion on "Reasonable Grounds," see section I(C), *supra.*

2. If the Motion is Granted

Once the motion for competency determination is granted, there are several steps you can take to "stack the deck" in your favor.

a. Commitment - Rule 11.3(d)

The defendant may be committed to a mental health facility for up to thirty (30) days if the court determines that the examination cannot be conducted otherwise. Rule 11.3(d); A.R.S. § 13-4507(E),(F). The decision to commit the defendant may be impacted by economic considerations as well as tactical considerations.

A.R.S. § 13-3992 provides that the expenses of transportation and confinement of a defendant to the state hospital any time prior to sentencing shall be charged to the county in which the indictment is found or the information filed. Follow your local office policy when making this decision.

The court does have the discretion to order the time and place of the examination. A.R.S. § 13-4507(A); *See State v. Cobb,* 110 Ariz. 578, 521 P.2d 1124 (1974). If a defendant is out of custody, the court may order the defendant to appear at a designated time and place for outpatient evaluation, A.R.S. § 13-4507(D), but may not involuntarily confine the defendant or take him into custody solely for the purpose of evaluation "unless the court determines that the defendant's confinement is necessary for the evaluation process." A.R.S. § 13-4507(C).

b. Submit Your List Of Experts - Rule 11.3(c)

Rule 11.3(c) gives you the option of including a list of three qualified experts (see definition, Rule 11.3(b)) in the motion for examination or the response to the motion. The rule requires that the court appoint one expert from each list. If a party fails to submit a list, the judge is free to appoint an expert of his choosing. Don't let this opportunity slip by. Maintain a list of experts and submit their names.

In *State v. Rossi,* 154 Ariz. 245, 741 P.2d 1233 (1987) (death penalty remanded), the court found that the "unanimous and uncontradicted opinion shared by three mental health experts and favorable to [the defendant]" outweighed substantial unfavorable lay testimony on the issue of the possibility of defendant being rehabilitated, and established that mitigating factor. This opinion seems to require "like refutation" of expert testimony. Although this requirement has not been extended to competency hearings, it serves to underscore the importance of assuming an active role in the nomination/selection of experts.

c. Request Additional Findings

Because Rule 11 is the procedure for all determinations of competency and for insanity, parties may request findings in addition to the determination of competency to stand trial. These additional findings may include determinations on defendant's competence to waive constitutional rights or plead guilty and defendant's mental state at the time of the offense.

3. Additional Findings to Request

a. Competence to Waive Constitutional Rights and/or Plead Guilty

The prosecutor should request additional findings on defendant's competence to waive constitutional rights and/or plead guilty. Because a determination of competence to stand trial is inadequate to meet the test for waiver of a constitutional right (*Westbrook v. Arizona*, 384 U.S. 150, 86 S.Ct. 1320 (1966)), a second examination/hearing will be required if the defendant's competence to stand trial is at issue and she seeks to waive a constitutional right (i.e. right to counsel) or plead guilty. *Sieling v. Eyman,* 478 F.2d 211 (9th Cir. 1973). However, if the original determination of competence included a finding of competence to waive constitutional rights, a second examination/hearing is not required absent evidence indicating a change in defendant's mental competence. *State v. Contreras,* 112 Ariz. 358, 542 P.2d 17 (1975); *State v. Bishop,* 137 Ariz. 5, 667 P.2d 1331 (App. Div. 2 1983). *See also* Section I(B)(4)(e), *supra.* "Subsequent hearings - waiver of constitutional rights".

b. Defendant's Mental State at the Time of the Crime

A.R.S. § 13-4506(A)(1) provides that any party or the court may, with the consent of the defendant, request a report on the defendant's mental state at the time of the crime. Although it is difficult to envision a situation where the prosecutor would make such a motion and the defendant would consent, there are circumstances where this rule has been interpreted to confer a right of examination for the state.

(1) Defendant Raises Insanity Defense

Once a defendant raises the insanity defense or notifies the court he plans to call expert psychiatric testimony, the state is entitled to an examination of the defendant. *State v. Druke,* 143 Ariz. 314, 693 P.2d 969 (App. Div. 2 1984). This entitlement is echoed in A.R.S. § 13-3993(A) and (B).
(Caveat: *Druke, supra*, also declared A.R.S. § 13-3993 "cannot constitutionally be construed as modifying or superseding the criminal rules." 143 Ariz. at 317.) The *Druke* court based their conclusion on the reciprocity implicit in Rule 15 (reciprocal rights of discovery).

(2) Defendant Raises "Reduced Capacity Negating Intent"

A defendant who places his mental condition in issue and gives notice of an intention to rely on psychiatric testimony to prove lack of intent has "opened the door" to an examination by an expert appointed on motion of the state. *State v. Schackart*, 175 Ariz. 494, 858 P.2d 639 (1993).

The rule speaks broadly to permit examinations whenever defendant's mental condition at the time of the offense is at issue. *Druke, supra.* In *Druke,* the defendant sought to introduce expert psychiatric testimony to substantiate his claim of reduced capacity negating intent but wanted the court to

prohibit the state from having the defendant examined by a state expert. The court, relying on earlier case law, found the purpose of discovery to be a "search for truth" with each side entitled to disclosure.

A.R.S. § 13-3993(B) provides that should a defendant refuse to be examined by the state expert, he will be precluded from introducing expert testimony on his mental state at the time of the crime.

In *State v. Williams*, 166 Ariz. 132, 800 P.2d 1240 (1987), the defendant was evasive and uncooperative when interviewed by the state's expert. On appeal, the state claimed § 13-3993(B) precluded defendant's use of expert testimony on the mental state of the defendant at the time of the crime. The supreme court disagreed. Because the state expert was able to conclude that the defendant was malingering, the court found the defendant had not "refused" to be examined by being evasive and uncooperative. Therefore, § 13-3993(B) did not apply. The court did not find it necessary to address any potential conflict between § 13-3993(B) and Rule 11.

C. The Experts

1. The Experts are Appointed

Once the court finds that reasonable grounds exist for an examination, the court must appoint at least two mental health experts. At least one of the experts must be a medical doctor. Rule 11.3(a). If the parties have submitted the names of qualified experts in either the motion for examination or the response to the motion for examination, the court must appoint one expert from each list. Rule 11.3(c). The court may appoint an expert of its own choosing if the parties fail to submit a list or if the experts submitted on the list are unavailable. Rule 11.3(c). The court may also appoint additional experts and require the defendant to submit to physical, neurological, or psychological examinations if an appointed expert advises that these examinations are necessary "to an adequate determination of the defendant's mental condition." Rule 11.3(g); *State v. Clabourne*, 142 Ariz. 335, 690 P.2d 54 (1984). (Note: The defendant need not consent to these additional examinations. Defendant's consent is only an issue when a report on defendant's state of mind at the time of the crime is requested by someone other than the defendant. See Section II(B)(4) "Request Additional Findings," *supra*.)

2. Cases - Appointment of Experts

*State v. Schackart,* 175 Ariz. 494, 858 P.2d 639 (1993).

> After the defense noticed a psychiatrist to testify at trial regarding the defendant's mental state, the state moved for a Rule 11 hearing and appointed one expert to evaluate the defendant. Citing Rule 11.3(a), defense counsel moved for the appointment of a second expert but did not submit a list of names for appointment. The trial judge appointed the psychiatrist noticed as a trial witness. The appellate court held that because defendant did not provide a list of experts, he waived his right to narrow the selection process, making the court's choice of the defense expert witness permissible. The fact that the defense doctor had already been retained by defense counsel did not disqualify him from being appointed under Rule 11.

*State v. Hansen,* 146 Ariz. 226, 705 P.2d 466 (App. Div. 2 1985).

> It was fundamental error to appoint only one mental health expert where Rule 11.3(a) specifically requires appointment of two experts. The error was not waived by failure to object. Case reversed.

*State v. Clabourne,* 142 Ariz. 335, 342-43, 690 P.2d 54, 61-62 (1984).

> Rule 11.3(f), allowing for the appointment of additional experts, is "intended to give the trial court the authority to appoint additional experts when those already appointed require assistance." It is not intended to provide the defendant with additional experts when he is dissatisfied with the conclusions reached by the original appointment experts.

*State v. Druke,* 143 Ariz. 314, 693 P.2d 969 (App. Div. 2 1984).

> The defendant need not raise the insanity defense for the state to be entitled to an examination. Rule 11 is intended to encompass all situations where defendant's mental state is at issue. Reciprocity demands that the defendant is not to be given an unwarranted advantage in the presentation of its case.

*State v. Gretzler*, 126 Ariz. 60, 612 P.2d 1023 (1980), appeal after remand 128 Ariz. 583, 627 P.2d 1081, and appeal after remand 135 Ariz. 42, 659 P.2d 1, cert. denied 461 U.S. 971, rehearing denied 463 U.S. 1236.

> The trial court did not err in refusing to appoint additional experts after defendant had been examined by two experts on the question of defendant's competence and mental state at the time of the crime.

*State v. Rose,* 121 Ariz. 131, 589 P.2d 5 (1978).

> Once the defendant had been examined by two court appointed experts who concluded that he was competent to stand trail and that he was aware of the nature and quality of his acts, it was not necessary to appoint an additional expert to evaluate the defendant. The requirements of § 13-1621 (repealed; now this rule) were met.

*State v. Parker,* 19 Ariz.App. 204, 206-07, 505 P.2d 1095, 1097-98 (App. Div. 1 1973).

> The state has a right to examine the defendant once a defense of insanity is raised. A prior determination of competence to stand trial is not sufficient.

3. Experts - a Definition

Rule 11.3(b) defines "mental health expert" as any licensed physician pursuant to Title 32, Chapter 13 and 17, and/or any licensed psychologist pursuant to Title 32, Chapter 19.1. There is no requirement in the rule that the experts appointed be psychologists or psychiatrists. The Rule permits the court to require at least one of the experts be a medical doctor upon its own motion or the motion of a party. Rule 11.3(a). In order to be a "certified psychologist," the expert must hold a doctorate degree in psychology or a related field. *State v. Howland,* 134 Ariz.

541, 658 P.2d 194 (App. Div. 2 1982) citing A.R.S. § 32-2085 (admissions to a marriage counselor with a Master's Degree in psychology were not protected by statutory or common law privilege); *State v. Vicker,* 129 Ariz. 506, 633 P.2d 315 (1981) (a "Psychology Associate II" with a master's degree is not a licensed psychologist); *State v. Steelman,* 120 Ariz. 301, 585 P.2d 1213 (1978) (court properly relied on testimony of medical doctor in concluding no reasonable grounds existed for a Rule 11 examination and hearing on defendant's competence to stand trial).

4. The Expert's Report

Under A.R.S. § 13-4509(A), the expert's report must contain at least the following information:

1. The name of each mental health expert who examines the defendant.
2. A description of the nature, content, extent and results of the examination and any test conducted.
3. The facts on which the findings are based.
4. An opinion as to the competency of the defendant.

If the expert determines the defendant is incompetent, the report must also include the following:

1. The nature of the mental disease, defect or disability that is the cause of the incompetency.
2. The defendant's prognosis.
3. The most appropriate form and place of treatment in this state, based on the defendant's therapeutic needs and potential threat to public safety.
4. Whether the defendant is incompetent to refuse treatment and should be subject to involuntary treatment.

A.R.S. § 13-4509(B).

The expert should also report conclusions on the additional competency determinations requested such as defendant's competence to plead guilty. Cf. *State v. Contreras,* 112 Ariz. 358, 542 P.2d 17 (1975) (expert's reports on competence which included findings on defendant's competence to plead guilty were dispositive absent additional evidence).

The report may also report on defendant's mental condition at the time of the offense if requested to do so and if the defendant consents to the request. *See supra,* Section II(B)(4)(b), "Request Additional Findings - Defendant's Mental State at the Time of the Offense." The report must also state the relation of the mental disease or defect to the alleged offense. A.R.S. § 13-4506(A)(2). The expert is not to express an opinion on the issue of defendant's legal sanity or insanity. This is a question for the finder of fact, not the expert.

5. Disclosure of Mental Health Evidence - Rule 11.4

All expert reports produced pursuant to Rule 11 are to be disclosed to all parties, "except that any statement or summary of the defendant's statements concerning the offense charged shall be made available only to the defendant." Rule 11.4(a). This disclosure requirement encompasses reports by appointed experts and reports prepared by "other experts." Rule 11.4(b). *See also* Rule 15.2(c)(2). Time for disclosure is governed by Rules 15.1, 15.2 and 15.6.

There is one exception to this broad disclosure requirement: Defendant's statements or summaries of defendant's statement may be revealed only to the defense. Failure to excise defendant's statements from reports to the prosecutor or the court is error, even if those statements are not introduced at trial. *State v. Decello,* 113 Ariz. 255, 550 P.2d 633 (1976). *But see State v. Ramirez,* 116 Ariz. 259, 569 P.2d 201 (1977)(error did not require reversal where disclosed statements were merely cumulative).

D. The Hearing - Rule 11.5

1. Rule vs. Reality

According to Rule 11.5(a), once the defendant is examined by the appointed experts, a hearing must be held to determine the issue of competency. The two sides are allowed to present evidence. Failure to hold a hearing as required by the rule is reversible error. *State v. Landrum,* 112 Ariz. 555, 544 P.2d 664 (1976); *State v. Sanders*, 110 Ariz. 503, 520 P.2d 1127 (1974). A plea of guilty does not waive the right to a hearing. *State v. Bishop,* 139 Ariz. 567, 679 P.2d 1054(1984).

The reality is that these matters are usually decided by the judge when the parties stipulate in writing to submit the matter on the experts' written reports. Rule 11.5(a). *But see State v. Mulligan,* 126 Ariz. 210, 613 P.2d 1266 (1980), and *State v. Hills,* 124 Ariz. 491, 605 P.2d 893 (1980) (failure to sign written stipulation not reversible where record was clear parties intended to stipulate). Defense counsel may consent to this waiver of hearing for the defendant. *State v. Contreras,* 112 Ariz. 358, 542 P.2d 17 (1975). If the two appointed experts disagree, the court will usually appoint a "tie-breaker" expert and rule with the recommendation of the majority.

If you do get involved in a case where a competency hearing is held, there are a few things you should remember.

a. This is Not a Determination of Sanity

Even if the experts have been asked to evaluate the mental status of the defendant at the time of the crime, the issue of sanity and whether the defendant should be relieved of responsibility for his actions is to be decided by the jury. Make sure the hearing doesn't go beyond its legislatively mandated purpose.

b. Burden of Proof

Questions of burden of proof are more applicable to the determination of reasonable grounds. There, as is traditional in law, the person urging the motion has the burden of proof. The standard is that the evidence must create a doubt in the mind of the judge as to defendant's ability to understand the proceedings against him and assist in his defense. *State v. Steelman,* 120 Ariz. 301, 585 P.2d 1213 (1978); *State v. Messier,* 114 Ariz. 522, 562 P.2d 402 (App. Div. 1 1977).

However, the determination of competence to stand trial is exclusively a question for the court and the judge is not bound by the testimony of experts or other evidence presented. *Bishop v. Pima County Superior Court,* 150 Ariz. 404, 724 P.2d 23 (1986). "[T]he determination of both law and fact is his." Id. 150 Ariz. at 409. The competency hearing is essentially non-adversarial and there are no "established positions." *Id*. at 408 Thus, technically, there is no burden of proof.

A defendant is considered legally competent if he or she has demonstrated the ability to make a reasoned choice among alternatives, understanding the consequences of that choice. This does not mean that the defendant has to make wise choices or choices that "objectively serve their best interests." The defendant is free to make an unwise choice so long as the decision was knowing, voluntary and intelligent. *State v. Kayer*, 194 Ariz. 423, 434, 984 P.2d 31, 42 (1999).

c. Counsel May be Called as Witnesses

> We therefore conclude that, in a competency hearing, the judge may call upon both counsel as officers of the court to provide whatever conclusions and opinions they may have, together with so much of the supporting facts as may be obtained without violating either the attorney-client privilege or the confidentiality provided attorney's work product.

*Bishop v. Pima County Superior Court*, 150 Ariz. 404, 410-11, 724 P.2d 23, 29-30 (1986).

The Arizona Supreme Court reached this conclusion after considering the nature of the competency inquiry and that defense counsel is often in the best position to testify on the issue of his client's competence.

The supreme court also limits the cross examination of defense counsel to questions on the ultimate issue, precluding questions on the basis of the opinion. While recognizing this limitation "constricts cross-examination very close to its permissible limits," the court cites the "diminished adversarial nature of the proceeding" and counsels' duty to ensure defendant's competence as factors that outweigh possible harm to the state from this limitation. This limitation should be read in conjunction with the previous quotation. Better yet, read the opinion.

2. The Defendant's Constitutional Rights

The Arizona rules and statutes on competency and commitment are specifically drafted to protect the due process rights of the defendant. Thus, the defendant is afforded many of the same constitutional protections she would have in trial.

a. The Right to be Present at the Competency Hearing

Defendant has a Sixth Amendment right to be present at the competency hearing. *State v. Bishop,* 139 Ariz. 567, 679 P.2d 1054 (1984). This right is grounded in the right to confrontation and can be waived by defendant or counsel. *Id.* If the defendant is absent from the hearing, the court must find the absence was voluntary. *Id.* (record must support finding of voluntary absence, did not do so here). *See In re MH 2006-000749*, 214 Ariz. 318, 152 P.3d 1201 (App. Div. 1 2007).

The issue of absence from the competency hearing is not relevant to the defendant's guilt or innocence and is non-jurisdictional in nature.

b. The Right to Counsel

Competency hearings cannot take place until the right to counsel has attached. Thus, defendant has a right to counsel at competency hearings. See Rule 11.2 and *State ex rel. Berger v. Maricopa County Superior Court,* 111 Ariz. 212, 526 P.2d 1234 (1974) (competency determinations may be held only after information or indictment filed).

Although a defendant has a right to counsel in formulating an approach to the examination, the defendant does not have the right to have counsel physically present during the examination. *State v. Schackart*, 175 Ariz. 494, 501, 858 P.2d 639, 646 (1993).

c. Protection Against Self-Incrimination

Statements made by the defendant to experts or related during the hearing may not be used at any subsequent proceeding for the determination of guilt or innocence. Rule 11.7. See also Section I(E), "Defendant's Statements," *supra.*

d. Right to Cross-Examination

The defense has the right to challenge the manner in which a mental examination has been conducted, or an expert's conclusions. *State v. Schackart*, 175 Ariz. 494, 502, 858 P.2d 639, 647 (1993).

3. Alternatives for Disposition of Defendant

Rule 11.5 sets out specifically the actions the court may take after the hearing:

b. Orders. After the hearing:

1) If the court finds that the defendant is competent, proceedings shall continue without delay.
2) If the court determines that the defendant is incompetent and that there is no substantial probability that he will become competent within 21 months of the date found incompetent, it may, upon request of any party,
(i) Remand defendant to Department of Health Services to begin civil commitment proceedings pursuant to Title 36, Chapter 5;
(ii) Order appointment of a guardian pursuant to Title 14, Chapter 5;
(iii) Release the defendant from custody and dismiss the charges without prejudice.

3) If the court determines that the defendant is incompetent, it shall order competency restoration treatment unless there is clear and convincing evidence that defendant will not regain competency within 15 months. The court shall determine whether the defendant should be subject to involuntary treatment and may extend the treatment for six months beyond the 15 month limit if it finds

defendant is making progress toward restoration of competency. All treatment orders shall specify the place where treatment will occur; whether the treatment is inpatient or outpatient pursuant to A.R.S. § 13-4512(A); transportation to the treatment site; length of treatment; and transportation after treatment. The treatment order shall specify that the court shall be notified if the defendant regains competency before the expiration of the order of commitment.

c. Modification of Order. The court may modify any order under Rule 11.5(b)(3) at any time.

d. Reports. The court shall order the person supervising defendant's court-ordered restoration treatment to file a report with the court, the prosecutor, the defense attorney and the clinical liaison as follows: 1) for inpatient treatment, 120 days after the court's original treatment order and each 180 days thereafter; 2) for outpatient treatment, every 60 days; 3) when the person supervising the defendant believes defendant is competent to stand trial; 4) when the person supervising the defendant concludes defendant will not be restored to competence within 21 months of the court's finding of incompetence; 5) 14 days before the expiration of the court's treatment order.

This section of Rule 11.5 was written to accommodate the U.S. Supreme Court decision in *Jackson v. Indiana,* 406 U.S. 715, 92 S.Ct. 1845 (1972). Commitment to a mental institution of an accused incompetent is severely limited by the due process and equal protection clauses. Rule 11.5(b), comment. Thus, the rules are not subject to wide interpretation.

> If the court finds the defendant to be incompetent, but not permanently so, it has a wide range of options. It can commit the defendant to a mental institution, if it finds either that he would be dangerous to himself or others if left at large, or that institutional treatment would be the most appropriate form of therapy. Either finding appears to be a sufficient basis for commitment under Jackson. If neither condition applies, the court must release the defendant upon appropriate conditions, one of which should be participation in a suitable therapeutic program. No order made under this section is to be effective for longer than six months, thereby insuring a frequent review of each incompetent's status and progress.

*Id*. The comment also notes that the court may consider evidence concerning the pending criminal charges in reaching a conclusion on defendant's future dangerousness for purposes of civil commitment, but the filing of criminal charges alone may not be the sole basis for the finding of dangerousness.

If a defendant is to be committed civilly, the commitment must follow the procedures set out in A.R.S. § 36-533 through 36-544.

4. Subsequent Hearings - Rule 11.6

Rule 11.6 is specific as to the actions the court must take once the defendant has been found incompetent

under Rule 11.5(b)(3). This section does not apply to additional determinations of competency during the course of the trial.

The mechanism provided by 11.6 was created to insure that a defendant's commitment would be reviewed on a regular basis to protect defendants from being committed indefinitely. The rule also allows for the dismissal of charges without prejudice (*see State v. Maricopa County Superior Court*, 113 Ariz. 432, 556 P.2d 6 (1976) if the defendant is incompetent and not likely to recover. Rule 11.6(e).

Rule 11.6(a) provides:

> The court shall hold a hearing to redetermine the defendant's competency:
>
> (1) Upon receiving a report from an authorized official of the institution in which a defendant is hospitalized under Rule 11.5(b)(2)(i) or (3) stating that in the official's opinion the defendant has become competent to stand trial; or
>
> (2) Upon motion of the defendant, accompanied by the certificate of a mental health expert stating that in the expert's opinion the defendant is competent to stand trial; or
>
> (3) At the expiration of the maximum period set by the court pursuant to Rule 11.5(b)(3); or
>
> (4) On the court's motion at any time.

There is no provision in the statute for waiver of this hearing. *See State v. Blazak,* 105 Ariz. 216, 462 P.2d 84 (1969) (trial judge erred in accepting attempted waiver contrary to statutory (A.R.S. § 13-1621 - now this rule) requirements).

The parties may stipulate to the admissibility of an expert's report and the judge may make his determination pursuant to Rule 11.6 based on that stipulated report and pleadings filed by counsel when the court presided over the initial Rule 11 proceedings and was familiar with the case. *State v. Kuhs*, 223 Ariz. 376, 224 P.3d 192, 196 (2010).

a. Finding of Competency - Rule 11.6(c)

If the defendant is found competent, the regular proceedings are to commence immediately. The rule also allows any stage of the proceeding to be repeated "if there are reasonable grounds to believe [defendant] was prejudiced by his previous incompetency." *Id*.

b. Finding of Continued Incompetency - Rule 11.6(d)

The court has two possible actions if the defendant is found to be still incompetent:

1) recommit defendant under Rules 11.5(b)(2) and (3); or
2) dismiss the charges.

If the charges are dismissed, the defendant must be released unless the court finds civil commitment is warranted (i.e., defendant is a danger to self or others or gravely disabled; *see* A.R.S. § 36-501 for definitions). *See also Nowell v. Rees*, 219 Ariz. 399, 199 P.3d 654 (App. Div. 1 2008).

Note: Arizona case law holds that all of the time defendant is incompetent to stand trial is excludable from speedy trial requirements. *State ex rel Berger v. Superior Court,* 111 Ariz. 212, 526 P.2d 1234 (1974). *See also* Rule 8.4(a). This exception may not include time when defendant is under civil commitment after dismissal of charges under Rule 11.6(e). See 11.6(e), comment.

There is no limit in the rule on the number of times defendant may be recommitted under Rule 11.6(d). *But see Jackson v. Indiana,* 406 U.S. 715, 92 S.Ct. 1845 (1972), which has been read to require the commitment "be justified by a showing of progress toward recovery of competency." Rule 11.6(a), comment.

c. Defendant's Right to Counsel, Appointment of New Experts

Under Rule 11.6(b), a defendant is entitled to the rights of counsel as provided by Rule 6, Ariz.R.Crim.P. Caveat: an incompetent defendant is not competent to waive counsel.

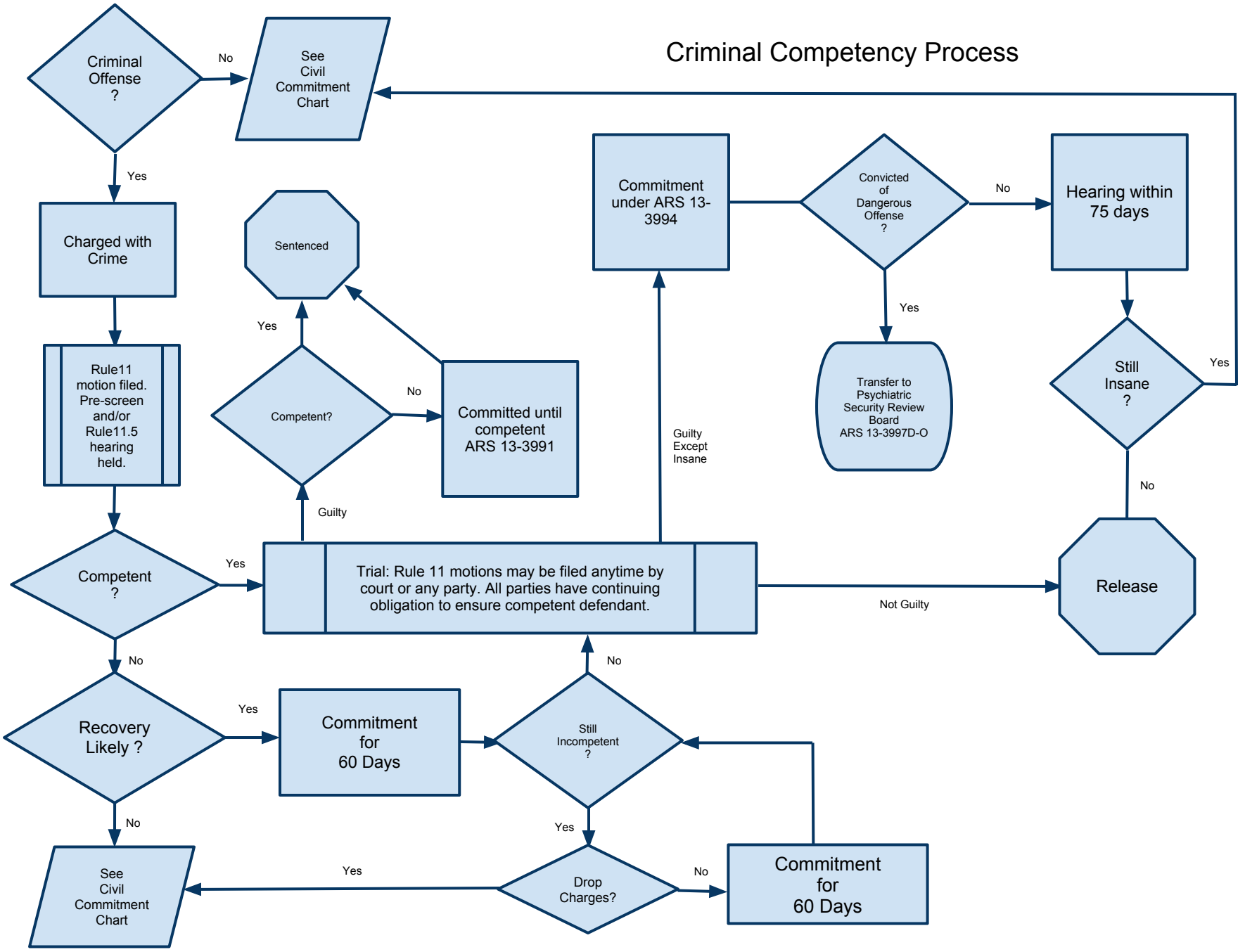
The court may also appoint new experts under Rule 11.3.at this stage of the proceedings. *See* Section II(B), "Experts," *supra*.

5. Appellate Relief

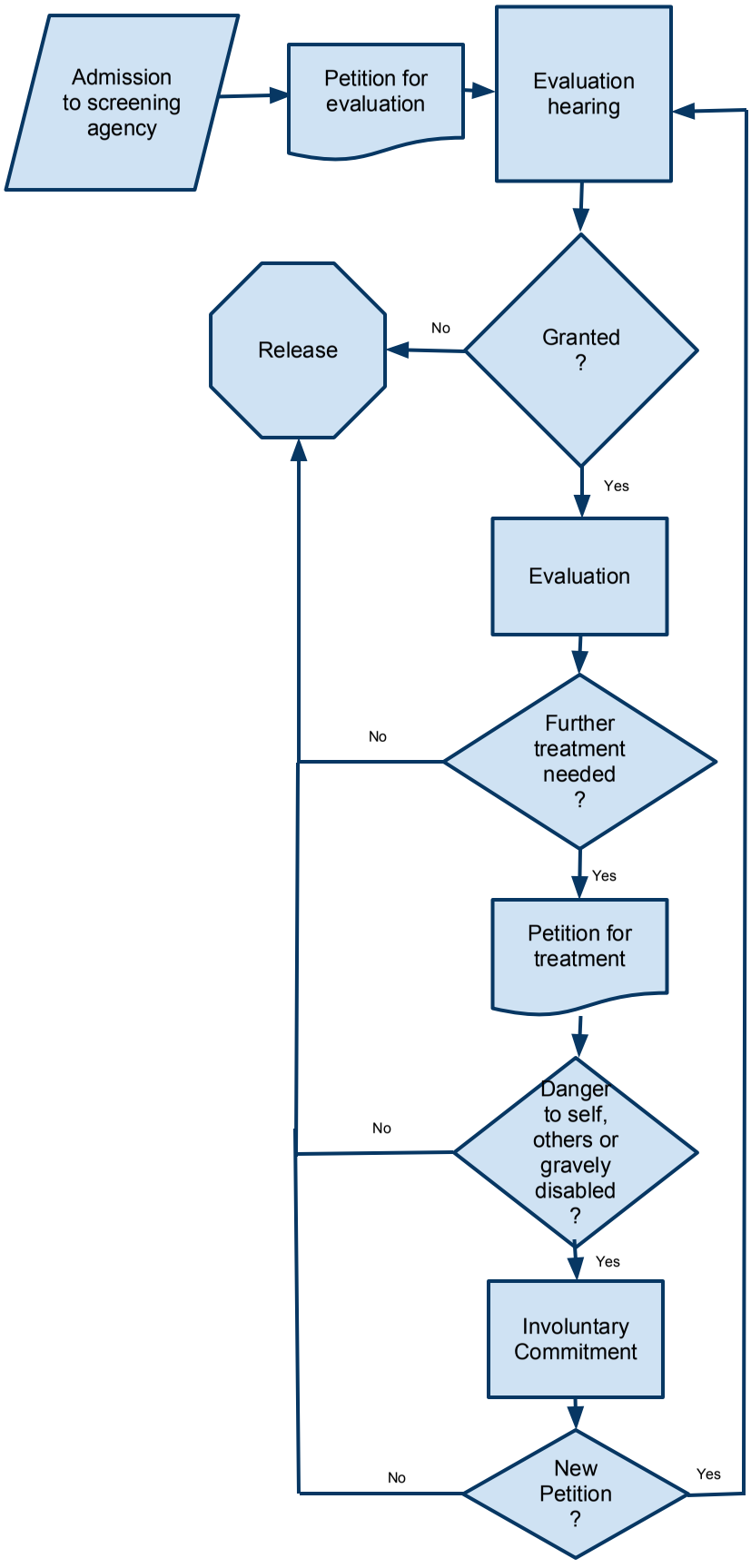
Conviction of an incompetent person violates due process. *Drope v. Missouri,* 420 U.S. 162, 95 S.Ct. 896 (1975); *Pate v. Robinson,* 383 U.S. 375, 86 S.Ct. 836 (1966). Reversal is required where redetermination of competence would not adequately protect defendant's due process rights. *Drope, supra.* The appellate court may determine the issue of competence if the record is sufficient. If reports and other evidence are not available, a new trial is required. *Id*.

However, if the record is deficient and there is sufficient evidence available, the court may remand for a determination of the competency issue alone. *State v. Wagner,* 114 Ariz. 459, 561 P.2d 1231 (1977); *State v. Berger*, 171 Ariz. 117, 828 P.2d 1258 (App. Div. 2 1992).

# Criminal Competency Process



# Civil Commitment Proceedings




Civil Commitment Statutes
ARS 36-520 - 36-544

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Application for Evaluation: ARS 36-520
Prepetition Screening: ARS 36-521
Petition for Evaluation: ARS 36-523
Evaluation & Possible Dispositions: ARS 36-531
Petition for Treatment: ARS 36-533
Hearing on Petition: ARS 36-535 - 36-539
Court Options, Max Treatment Periods: ARS 36-540
Notification of Victims: ARS 36-541.01
Options at Expiration of Treatment Period: ARS 36-542